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Supreme Court, U.S.
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No. 06-1241

IN THE

Supreme Court of the United States

ROBIN R. SZELIGA and ROBERT S. WOODRUFF,

Petitioners,

v.

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, by TREASURER BRADLEY ABELOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant extraordin interlocutory review of a ruling uphold New Jersey's exercise of personal jurisdiction o petitioners, where the ruling simply represent faithful and unexceptional application of this Cou well-settled personal jurisdiction jurisprudence.

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PARTIES TO THE PROCEEDINGS BELOW

During the pendency of state appellate proceedings in this matter, Bradley Abelow succeeded John E. McCormac as New Jersey State Treasurer.

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STATEMENT OF THE CASE

This civil action was brought in New Jersey Superior Court, Mercer County, Law Division. Plaintiff/respondent is the State of New Jersey, Department of Treasury, Division of Investment ("NJT") – one of the fifty largest public or private money managers in the United States, with responsibility for managing pension funds for the retirement plans of over 600,000 active and retired New Jersey employees.

NJT's claims, for fraud and under other state common law theories, arise from substantial losses on its investment in over seven million shares of publicly traded common stock in Qwest Communications International, Inc. ("Qwest"). Pet. App. 5. Named as defendants in NJT's complaint were Qwest, its outside accountant Arthur Andersen, LLC ("Andersen"), and eleven of Qwest's officers and directors (the "Individual Defendants"). Pet. App. 22. Among the Individual Defendants are petitioners Robert S. Woodruff and Robin R. Szeliga, both of whom served, in succession, as Qwest's Chief Financial Officer during the relevant period. Pet. App. 6-7, 8-9.

NJT purchased its shares of Qwest stock between April 1999 and December 2001, at prices that were artificially inflated due to a series of misrepresentations of Qwest's earnings and assets. The misrepresentations, by petitioners and other defendants acting in concert with them, were made in public statements, press releases, filings with the United States Securities and Exchange Commission, and conference calls with investors in which a representative of NJT participated. Qwest has since

restated its earnings for the years 2000 and 2001. Pet. App. 5. The fraudulent statements were made in materials disseminated into New Jersey, with the knowledge, purpose, and intent that New Jersey investors such as NJT would purchase Qwest stock in reliance on them. Pet. App. 14-15.

Several of the Individual Defendants, including petitioners, moved to dismiss for lack of personal jurisdiction. The Law Division denied the motion. On interlocutory appeal, the Appellate Division affirmed on August 18, 2006. Pet. App. 1-20. Its opinion is now reported as *State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l, Inc.*, 387 N.J. Super. 487, 904 A.2d 786 (App. Div. 2006). The New Jersey Supreme Court denied review on December 8, 2006. Pet. App. 46. The instant petition for certiorari followed. One of the other Individual Defendants, Philip F. Anschutz, has filed a separate petition for certiorari in this Court, docketed as No. 06-1235, seeking review of the same order.

The underlying claims against Qwest, Andersen, and the other defendants remain pending in the Law Division, with trial expected in 2008.

REASONS FOR DENYING THE PETITION

In a vain effort to transform a garden-variety ruling on personal jurisdiction into grist for interlocutory review in this Court, petitioners rewrite not only the factual record but also the New Jersey Superior Court's decision in this case. The Appellate Division did not in fact adopt any sweeping holding that "foreseeability alone is sufficient as a jurisdictional hook," as petitioners would have it.

Pet. at 19. Neither did it hold that "the vicarious liability of conspiracy law can support a vicarious exercise of jurisdiction." Pet. at 28. Rather, the Appellate Division applied the long-settled teachings of this Court to uphold specific jurisdiction over defendants, including petitioners, whose fraudulent communications were disseminated into New Jersey with the knowledge, intention, and expectation that investors like NJT would purchase Qwest securities in reliance on defendants' misrepresentations. That ruling is unexotic and certainly supplies no occasion for extraordinary interlocutory intervention by this Court. All necessary guidance was already supplied by numerous previous decisions of this Court, which the Appellate Division faithfully applied.

As the Appellate Division correctly noted, *see* Pet. App. at 11, petitioners have raised no argument on appeal that New Jersey's exercise of personal jurisdiction offends traditional notions of "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Personal jurisdiction therefore depends solely on the familiar question whether defendants purposefully established "minimum contacts" in the forum state. *E.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

The facts on which the Law Division and Appellate Division both found that test to be satisfied are aptly summarized in the Appellate Division's opinion. *See* Pet. App. 4-10. In fall 1996, when Qwest was considering a public offering of its stock, its chairman Philip Anschutz met with petitioners' co-defendant Joseph P. Nacchio in New Jersey to discuss Nacchio's joining Qwest as CEO. Once hired

in that capacity, Nacchio worked both from Qwest's headquarters in Denver, Colorado, and from its newly opened offices in New Jersey.

During their respective tenures as CFO, both petitioners reported to Nacchio. After Qwest went public, it added an investor relations division, which reported to the CFO. The investor relations division communicated with shareholders and the investment community; press releases and SEC filings were sent to investors who requested information. An NJT representative received that information in New Jersey: These materials included SEC filings and press releases, signed and approved by petitioners themselves, touting Qwest's strong revenue growth. In fact, however, Qwest's revenues were fraudulently inflated through such devices as the false reporting of "swap" transactions, in which network capacity was sold and repurchased, with the putative "sales" reported as revenue. Woodruff also traveled to New Jersey to woo investors and as part of the budgeting and earnings release processes. Szeliga personally participated in an investor conference call that a representative of NJT attended.

To these facts, the Law Division and Appellate Division applied well-settled law to find that petitioners and the other moving Individual Defendants had sufficient contacts with New Jersey to support specific jurisdiction. Nothing about those rulings departed in any way from this Court's precedents. This is not a case, in particular, in which personal jurisdiction is asserted over a defendant who merely placed some commodity in the general stream of commerce, with the commodity then traveling by happenstance to a forum state where the defendant

had never conducted business or transmitted communications. *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Rather, it involves fraudulent statements knowingly and intentionally disseminated, to New Jersey specifically and to other jurisdictions as well, for the specific purpose of providing information to investors on which they might rely, and did rely, in their purchase of Qwest securities. As the Appellate Division correctly observed: "Fraudulent communications are at the center of this controversy. NJT's claims are based on its assertion that it was injured as a consequence of intentionally false statements about the financial health of Qwest that were disseminated in this State and upon which NJT relied in investing public funds." Pet. App. 11.

The Appellate Division's analysis enjoys solid foundations in numerous decisions from this Court, including decisions involving personal jurisdiction in intentional tort cases based on communications purposefully disseminated into a state with the knowledge or intention that they will cause harm within that state. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984). Indeed, petitioners offer no basis on which to distinguish *Calder*, save for an argument that the fraudulent communications at issue here were also transmitted to investors in other states, in addition to New Jersey. Nothing in this Court's personal jurisdiction jurisprudence suggests, however, that a defendant may defeat personal jurisdiction in one forum by the simple artifice of transmitting the same fraudulent representations to residents of other jurisdictions in the course of the defendant's broader tortious endeavors. Such a rule

would have the perverse result that the greater the geographic scope of the defendant's tortious conduct, the less amenable to specific jurisdiction the defendant would be in any jurisdiction but the defendant's own domicile.

Nor did the Appellate Division rest its decision on any notion that a plaintiff's bare allegation of conspiracy warrants imputation of each conspirator's forum contacts to all co-conspirators. Quite the contrary, the Appellate Division expressly stated that "the actions and knowledge of each [defendant] must be considered individually not in the aggregate," Pet. App. 14, and its opinion does exactly that. *See, e.g.*, Pet. App. 8-9, 14-15.

A writ of certiorari would be inappropriate in any event, because the decisions of the Law Division and Appellate Division are interlocutory, not final. This Court rarely grants certiorari to review interlocutory judgments. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993). As this Court has recognized, the fact that a party must proceed in litigation is not a ground for such review. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967). Premature review may involve the Court in unnecessary constitutional adjudication and should therefore be avoided. *See* Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). Accordingly, as a general rule, this Court will not issue a writ of certiorari to review an interlocutory decree, unless it is necessary to prevent extraordinary inconvenience and embarrassment to the conduct of the case. *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). There is no such necessity here. Discovery is

still underway in the Law Division, and the Appellate Division's opinion specifically notes that information coming to light as discovery progresses may bear on personal jurisdiction. Pet. App. 20. Petitioner will be free to pursue appellate relief after final judgment. Review at this stage is both unnecessary and premature.

CONCLUSION

For the reasons given, respondent respectfully requests that the honorable members of this Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

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